IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 28

GENERAL DRIVERS AND HELPERS UNION, LOCAL 554, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND NEBRASKA SHORT LINE CARRIERS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS.

APPELLANT'S BRIEF.

Certificate of Service Appended at Page 22.

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OPINIONS.

The opinion of the United States District Court for the Southern District of Illinois is reported in 194 F. Supp. 31. A copy of the opinion appears in the printed record (R. 209). The report and order of the Interstate Commerce Commission is reported in 79 M. C. C. 599 and is in the printed record (R. 99).

JURISDICTION.

This action is brought pursuant to the provisions of 28 U. S. C. 1336, to set aside an order of the Interstate Commerce Commission. On April 27, 1961, a judgment of the District Court for the Southern District of Illinois, Northern Division, was entered; a notice of appeal was filed in that court by appellant on June 22, 1961. Jurisdiction of the Supreme Court to review this decision by direct appeal is pursuant to 28 U. S. C. 1253 and 2101(b). Jurisdiction of the Supreme Court to review this judgment on direct appeal is sustained in the following cases: *American Trucking Association, Inc.* v. *United States*, 364 U. S. 1; *Schaffer Transportation Company* v. *United States*, 355 U. S. 83; *M. & M. Transportation Co.* v. *United States*, 350 U. S. 857.

STATUTES INVOLVED.

Sections 207(a) and 212 of the Interstate Commerce Act, 49 U. S. C. 307(a) and 312; and Section 703(8)(e) of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U. S. C. 8(3).

QUESTIONS PRESENTED.

1. Whether the issuance of Motion Carrier Certificates by the Interstate Commerce Commission as a result of labor disputes and because of the non-union character of applicant exceeds the statutory power of the Commission and is contrary to the policy of Congress.
2. Whether the request for operating authority by Nebraska Short Line Carriers, Inc., Appellee, was based primarily on facts and circumstances within the exclusive jurisdiction of the National Labor

Relations Board and outside the jurisdiction of the Interstate Commerce Commission.

3. Whether temporary interruptions of interlining between non-union intrastate motor carriers and some interstate motor carriers in a particular area arising out of a labor dispute, may, consistent with the standards set forth in the Interstate Commerce Act and National Transportation Policy be made the basis for the grant of permanent operating authority to a non-union carrier in that area.

4. Whether the Commission erroneously used the grant of additional operating authority under Section 207 of the Interstate Commerce Act (49 U. S. C. 307) in a situation where the appropriate remedy, if any, was a proceeding under Section 212 of the Interstate Commerce Act (49 U. S. C. 312) to compel certain carriers to comply with their obligations under their Certificates of Public Convenience and Necessity.

STATEMENT.

This appeal is based on an action by the Burlington Truck Lines, Inc., a corporation, against the Interstate Commerce Commission and the United States of America, in which Burlington Truck Lines, Inc., appellant herein, requested the Federal District Court to enter a decree to adjudge the orders of the Interstate Commerce Commission entered June 1, 1959, and March 10, 1960, in the matter of Nebraska Short Line Carriers, Inc.,—Common Carrier Application—Doc. No. MC-116067 to be unlawful, null and void and in violation of the Interstate Commerce Act. Appellant, General Drivers and Helpers Union Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, intervened in this proceeding alleging substantially the

same matters that were stated in the original complaint of Burlington Truck Lines, Inc.

In addition some nine motor carriers intervened and each based intervention on substantially the same allegations.

Nebraska Short Line Carriers, Inc., appellee herein, and the applicant before the Commission, is a Nebraska corporation organized by twelve intrastate Nebraska motor carriers; it sought rights from the Interstate Commerce Commission because of the fact that existing carriers were alleged to have declined to perform interchange operations with motor carriers that were stockholders in Nebraska Short Line Carriers, Inc. All stockholders of Nebraska Short Line Carriers, Inc., are non-union carriers who have been subjected to union organizational activity and who desire to operate as non-union carriers.

The factual situation involved herein began some time in 1955 when the Teamsters union undertook to organize common carrier employees in Nebraska. Several primary strikes occurred at this time, including one against one of the stockholders of Nebraska Short Line Carriers, Inc., Clark Brothers Transfer Company. In addition to this, other stockholder carriers of Nebraska Short Line Carriers, Inc., were contacted by Teamster representatives for organization purposes and also for purposes of executing collective bargaining agreements. When the stockholder carriers refused, the Teamster union invoked the provisions of Article IX of their agreement, sometimes referred to as the "hot cargo" clause (R. 79-80-81). Appellants are unionized carriers who have executed collective bargaining agreements with the Teamsters union containing "hot cargo" clauses. These clauses are properly referred to as "protection of rights" clauses; they provide that the carrier will not discharge or discipline any employee who

refuses to cross a picket line or handle unfair goods, which unfair freight and goods have been designated such by the Teamsters because of a labor dispute.

Nebraska Short Line Carriers, Inc., filed an application seeking a Certificate of Public Convenience and Necessity from the Interstate Commerce Commission on June 22, 1956; the case was designated as Doc. No. MC-116067. The matter was heard over an extensive period of time by Trial Examiner Donald R. Sutherland of the Interstate Commerce Commission, who, in an order dated September 3, 1957, recommended denial of the application (R. 48-69). Nebraska Short Line Carriers, Inc., on January 10, 1957, filed another application seeking a Certificate of Public Convenience and Necessity from the Interstate Commerce Commission in Doc. No. MC-116067, sub No. 2. On August 8, 1957, Trial Examiner Michael B. Driscoll recommended that the application be denied (R. 78-97).

Thereafter, the matters were orally argued to the Interstate Commerce Commission in a combined hearing and the Commission on June 1, 1959, partially granted said applications in a single report (R. 99-119). The denial of the application by Examiner Driscoll was affirmed by the Interstate Commerce Commission; Examiner Sutherland's decision was reversed in part and affirmed in part.

The finding of facts in both Trial Examiners' reports indicated that the temporary interchange interruptions arose as a result of a labor dispute. This is borne out by Examiner Driscoll's findings of fact (R. 83) in which it was stated:

> 12. *As a corporation, applicant has now no policy on unionization, but it does have a firm policy to the effect that, under no conditions, would it ever agree to a Union contract containing any hot cargo provisions. It is so firm on that point that it offered, through an amendment, to have any issued certificate contain a*

provision to the effect that, if it were faced with the alternate of signing such a contract or going out of business, it would surrender its certificate for cancellation. (Emphasis supplied.)

To further substantiate the existence of a labor dispute that resulted in temporary interchange interruptions, Examiner Driscoll found as follows:

"38. The trunkline carriers have union contracts. *The eastern Nebraska carriers are for the most part small or relatively small business men. Most of them are obviously opposed to unionization of their business. This Commission has no authority nor means of solving that problem. If, as some eastern Nebraska carriers imply, the National Labor Relations Board does not offer a solution to that problem, then it obviously is a problem that only the Legislative Branch of the Federal Government could solve. Certainly, this Commission is in no position to solve it.*" (R. 96.) (Emphasis supplied.)

"39. The principle recommended for application to this particular proceeding can be stated in this way: To the extent that the interchange and service defects and inadequacies complained of have been actually due to labor difficulties, and if, as to those difficulties, the carriers immediately affected have exercised such diligence and prudence as would normally be exercised by a business man faced with such difficulties, then, and to that extent, their services and interchange practices will not be considered inadequate for public convenience and necessity purposes." (R. 97.)

"(fol. 84.) 40. When that principle is applied here, it must be found that, so far as labor difficulties have affected interchange practices and services, the trunkline carriers are entitled to a protective finding." (R. 97.)

"41. When that conclusion is made, there is nothing much left upon which a finding of public necessity could be based. Denial of the application must therefore be recommended." (R. 97.)

The Commission has for the most part adopted the findings of its Examiners. The Appellants will refer to the Examiners' findings as those of the Commission. Appellants vigorously contended before the two Examiners and the Interstate Commerce Commission and the Federal District Court that the facts as found by the Commission do not as a matter of law support its decision; it was asserted by Appellants that the Commission acted beyond its statutory power in this matter. However, it is asserted in this Brief by Appellant that the findings of the Examiners, which findings were adopted by the Commission, indicate that the Commission had no authority or means of solving the problem of the labor dispute. This Appellant asserts that the Commission itself, by adopting the Examiners' findings, which findings were premised primarily upon the existence of a labor dispute, could not, as a matter of law, find that Appellees were entitled to the rights granted.

Both Examiners' reports indicate that the basis for applicants' request for authority was because of their non-union status.

After the Commission's grant of authority, and within proper time limits, appellant Burlington Truck Lines, Inc., brought an action to set aside the order. General Drivers and Helpers Union Local 554 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, intervened in this action. The Three Judge District Court upheld the Commission's order and dismissed the complaint, one of the judges, Judge Mercer, dissenting (R. 70).

SUMMARY OF ARGUMENT.

(A) The Issuance of Motor Carrier Certificates by the Interstate Commerce Commission as a Result of Labor Disputes and Because of the Non-Union Character of Applicants Exceeds the Statutory Power of the Commission and Is Contrary to the Policy of Congress.

(B) The Request for Operating Authority by Nebraska Short Line Carriers, Inc., Appellee, Was Based Primarily on Facts and Circumstances Within the Exclusive Jurisdiction of the National Labor Relations Board and Outside the Jurisdiction of the Interstate Commerce Commission.

(C) Temporary Interruptions of Interlining Between Non-Union Intrastate Motor Carriers and Some Interstate Motor Carriers in a Particular Area Arising Out of a Labor Dispute May Not, Consistently With the Standards Set Forth in the Interstate Commerce Act and the National Transportation Policy, Be Made the Basis for the Grant of Permanent Operating Authority to a Non-Union Carrier in That Area.

(D) The Commission Erroneously Used the Grant of Additional Operating Authority Under Section 207 of the Interstate Commerce Act (49 U. S. C. 307) in a Situation Where the Appropriate Remedy, If Any, Was a Proceeding Under Section 212 of the Interstate Commerce Act (49 U. S. C. 312) to Compel Certain Carriers to Comply With Their Obligations Under Their Certificates of Public Convenience and Necessity.

With respect to the evidentiary matter involved in this proceedings, Appellant adopts the position of the dissenting Judge Mercer that the order should be set aside for

the reason that the finding of public convenience and necessity is contrary to the evidentiary findings of the Commission upon which the ultimate finding is based. In every application for authority to operate as a common carrier, the Commission must determine the adequacy of the facilities of existing carriers as a preface to its decision. The basic findings of fact by the Commission are contrary to the proposition that the existing carrier facilities and service capabilities are inadequate.

It is strenuously urged by the Appellant that the Commission has no jurisdiction to enter the order under review. As Judge Mercer stated in his dissenting opinion:

> *"The hard core of this whole case is one fact, namely, the existence of a labor dispute between Local 544 and certain of the stockholder carriers. Any doubt as to the large effect of that fact is dispelled by reading the Commission's report. Most significant, I think, is the fact that the Commission found it necessary to devote paragraph after paragraph and several pages of its report to a discussion of the labor aspects of the case and to an explanation that it was not (fol. 2934) deciding that labor issue. In like manner, in approaching the conclusion that the order of the Commission is valid, the majority of the court devotes some 15 typewritten pages of opinion to the labor aspects of the case, to the duty of a common carrier to the public despite labor involvement and to a discussion of the lack of any decision on a labor dispute in the Commission's disposition of this case."* (Emphasis supplied, R. 264, 265.)

The labor aspects of this case furnished the Commission with an opportunity to grant authorities of public convenience and necessity to applicant beyond that granted by the Interstate Commerce Act.

ARGUMENT.

(A)

The Interstate Commerce Commission does not have power to determine labor disputes, even those involving common carriers. It has the power of granting Motor Carrier Certificates and of determining complaint cases involving refusal of motor carriers to service shippers and to prevent discrimination with regard to shippers. The power to issue certificates authorizing the institution of motor carrier service was granted to the Commission in order to enable it to authorize such services in the areas where a permanent need for such services was shown. This power was never intended as an instrument for the solution of labor disputes or the resolution of labor problems.

Although the Commission has stated in its decision and order granting the rights involved in this matter, that it is not resolving a labor dispute or involving itself in labor problems in any manner or form, it is obvious from the facts in this matter that the Commission has relied primarily upon a labor dispute situation and the non-union character of applicant as the basis for granting interstate operating rights. Despite statements to the contrary in the decision of the Interstate Commerce Commission, its decision is based primarily upon an evaluation of a labor dispute. It is very significant that in Trial Examiner Driscoll's report (R. 83) a finding was made, based upon the statement of applicant, that if issued a certificate of convenience and necessity, such a certificate could contain a provision to the effect that, "If it were faced with the alternate of signing such a contract or going out of business, it would surrender its certificate for cancellation."

Applicant further stated to the Trial Examiner that under no conditions would it ever agree to a union contract containing any "hot cargo" provisions. Can the Commission disregard this statement that applicant voluntarily made in one of its proceedings and grant the application, which concerned itself primarily with a refusal to sign and execute a union contract containing a "hot cargo" provision? Obviously, the "hot cargo" clause must have been the basis for applying for interstate operating rights by the Nebraska Short Line Carriers, Inc.

Prior to the 1959 amendments (Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. 158, 73 Stat. 543, Section 8(e), Section 703(b), 73 Stat. 519) union inducement of concerted work stoppages to compel adoption or enforcement of hot cargo agreements was unlawful under the secondary-boycott ban. However, this Court held, in *Carpenters, Local 1976* v. *NLRB*, 357 U. S. 93, commonly known as the Sand Door case, although union inducement of work stoppages to enforce hot cargo agreements violated the secondary-boycott ban, *the voluntary observance of a hot-cargo agreement by an employer did not violate that ban, and that the mere execution of a hot cargo agreement was not, in itself, inducement of employees to refuse to handle hot cargo, in violation of the ban.* This ruling, it is submitted, is still applicable under the 1959 amendments. Under the 1959 amendment, a protection of rights clause (hot cargo) would not necessarily violate Section 8(e) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U. S. C. 158, 73 Stat. 543).

The 1959 amendments (Section 8(e), Section 703(b), 73 Stat. 519, Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. 158, 73 Stat. 543) bans express or implied hot cargo agreements between employers and unions and makes the entering into of any such agreements an unfair labor practice on the part of both employers and

unions; in addition it declared such agreements void and unenforceable. If this clause constitutes the basis for Nebraska Short Line Carriers, Inc., application for certificate of convenience and necessity, then the reason for the application has been delimited by Congressional action. It is the contention of Appellant that all agreements included within the "hot cargo" category were not banned by Section 8(e) of the Act; in other words, such clauses may be constructed in such a manner so as to not come within the purview of the proscriptions as set out in Section 8(e).

The power to issue motor carrier certificates by the Interstate Commerce Commission was never intended as an instrument for the solution of labor disputes. Congress has protected certain activities of employees and their bargaining representatives including the right to strike and to engage in concerted activities as a legitimate means by which labor organizations may represent and bargain for employees pursuant to the provisions of the Labor-Management Relations Act, 29 U. S. C. 1 *et seq.* Power granted to the Commission by Congress was never intended as a weapon to destroy legal collective bargaining clauses and the legitimate objectives and purposes of labor organizations or to authorize the establishment of a new carrier whenever the operations of existing carriers are involved in temporary labor disputes.

There is no assurance that the employees of Nebraska Short Line Carriers, Inc., may not in the future decide to form, join or assist a labor organization and to secure a collective bargaining agreement from it. Perhaps, during collective bargaining, a similar provision to a "hot cargo" clause may be submitted to Nebraska Short Line Carriers, Inc., by a labor organization representing its employees, which clause may meet the legal test. If this situation presented itself to Nebraska Short Line, would it then

surrender the certificate granted by the Commission in consonance with its offer in Examiner Driscoll's Report (R. 83)?

To grant a certificate of convenience and necessity upon the basis of a non-union character of an applicant arising out of a temporary labor dispute and collective bargaining clauses involving the handling or non-handling of freight, would open the door to many application for certificates of convenience and necessity based on labor disputes. The exclusive regulation of labor relations resides in the National Labor Relations Board, not the Interstate Commerce Commission.

(B)

Applicant, to sustain its contentions for the granting of a certificate of convenience and necessity on the basis of the applicant's non-union character and on the basis of alleged secondary boycotts, presents a novel situation and one that is without precedent as the basis for the issuance of motor carrier operative authority. Applicant invoked the jurisdiction of the Interstate Commerce Commission to grant a certificate of convenience and necessity to it on the basis of activities that are exclusively within the purview of the Labor Management Relations Act of 1947, 29 U. S. C. A. 150. Congress, in enacting said Act, considered the extent to which labor practices affecting interstate commerce should be regulated. Without question, it left these matters solely and exclusively to the National Labor Relations Board and to proceedings under the above quoted Act. By such action, the matters involved herein and under which applicant complains are outside the competence of the Interstate Commerce Commission. Congressional policy was set out in the preamble of the statute. Consequently, if applicant or any other neutral employer is involved in an alleged secondary boycott activity on the

part of a union, it has an adequate remedy in the courts and before the National Labor Relations Board pursuant to the provisions of the above statute. Neutrals are protected from involvement in labor disputes by virtue of Section 8(b)(4)(A) of the National Labor Relations Act, as amended. The Court of Appeals for the Second Circuit, with regard to this situation, stated:

> "We have here a problem involving the rights of neutrals in a lawful economic war between an employer and a union. The Taft-Hartley Act does not completely shelter neutrals • • • Instead, the Act recognizes and undertakes to reconcile the competing claims of unions to strike and of bystanders to be free of harm from so-called 'secondary boycotts.'"
>
> *NLRB* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 67 (C. A. 2).

Section 10(a) of the Act is as follows:

> "Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise; • • •"

Congress gave sole and exclusive power to the National Labor Relations Board to prevent unfair labor practices, the same activities as applicant alleges have been involved in this matter.

Perhaps the two most important cases with regard to the exclusive jurisdiction of the National Labor Relations Board are:

> *Garner* v. *Teamsters Union*, 346 U. S. 485 (1953),
>
> and
>
> *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 (1955).

In both these cases, this Court refused to pass upon the question of whether the Union's conduct was protected or prohibited under the Act; instead, it left the sole power to administer the Act to the National Labor Relations Board.

Under the Labor Management Relations Act, not only are there prohibitions against certain particular union activities as set forth in Section 8(b), 29 USCA paragraph 158(b), but at the same time, it accorded to labor, in Section 7 of the same Act, rights of self-organization, collective bargaining and concerted action for mutual aid or protection. In addition to the above acts, it is the duty of an employer to bargain collectively in good faith with the representative of his employees. In view of the declared public policy of the Labor Management Relations Act and the fact that it was enacted by Congress in 1947 after passage of the Motor Carrier Act, it is reasonable to say that Congress did not consider that another federal agency, the Interstate Commerce Commission, would intervene in the same area as the National Labor Relations Board on the same subject matter. In *Garner* v. *Teamsters Union, supra,* the Court stated:

> "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules * * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

In a series of decisions, the Supreme Court of the United States has again re-emphasized this doctrine; *Gus* v. *Utah LRB,* 77 S. Ct. 598; *Amalgamated Meat Cutters* v. *Fairlawn,* 77 S. Ct. 604; *San Diego Building Trades* v. *Garmon,* 77 S. Ct. 607. Thus, it is obvious that in recent decisions of this Court, it has been made abundantly clear that reg-

ulation of labor relations and collective bargaining is solely within the jurisdiction of the National Labor Relations Board. Not only are states and administrative agencies of states prohibited from invading the field of labor relations as to industries that affect interstate commerce, but even federal courts and agencies are likewise excluded from this area of regulation, *Weber* v. *Anheuser-Busch, supra* (348 U. S. 479). Granting a certificate of convenience and necessity to the applicant in this matter on the basis of the non-union character of applicant and on the basis of alleged secondary boycott activity by a union, injects the Commission into the area of labor relations and collective bargaining. This invades the basic jurisdiction of another federal agency and opens the door to multitudinous litigation before the Commission. There have been numerous instances where Congress has created an administrative agency and defined the scope of its activities, thereby placing them in a superseding position with respect to another administrative agency: *Eugene Dietzgen Co.* v. *FTC*, 142 F. 2d 321, 331 (CA 7, 1944), cert. den. 323 U. S. 730 (1944); *United Corp.* v. *FTC*, 110 F. 2d 473, 475 (CA 4, 1940); *Chamber of Commerce of Minneapolis* v. *FTC*, 13 F. 2d 673, 685-686 (CA 8, 1926); *U. S.* v. *Western Union Telegraph Co.*, 53 F. Supp. 377, 381 (S. D. N. Y., 1943); *T. C. Hurst & Son* v. *FTC*, 268 Fed. 874, 877 (E. D. Va., 1920); *Far East Conference* v. *U. S.*, 342 U. S. 570, 573-574 (1952); *U. S.* v. *Rock Royal Cooperative*, 307 U. S. 533, 558-560 (1939); *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485 (1932); cf. *U. S.* v. *American Trucking Assns.*, 310 U. S. 534, 544-545 (1940); *Brougham* v. *Blanton Mfg. Co.*, 249 U. S. 495, 499 (1919).

In two decisions, this Court held the *Weber* v. *Anheuser-Busch* opinion controlling and that the Labor Management Relations Act of 1947 prevents a state from applying its

laws defining the duties of a common carrier and invalidating the hot cargo provisions in collective bargaining contracts with interstate commerce carriers: *General Drivers, Warehousemen, etc., Local Union 89* v. *American Tobacco Co.,* 248 U. S. 978; and *Teamsters, Local 327* v. *Korrigan Iron Works,* 353 U. S. 968. In the latter case, carriers and their employees had been enjoined from refusing to cross picket lines at a struck shipper's premises despite the contract clause which allowed employees to refuse to handle the goods of a struck firm. The state court reasoned that a state law requiring carriers to render service gave it authority regardless of the Taft-Hartley Act. In the latter case, this Court, in a per curiam decision, held the opposite.

(C)

Pursuant to the provisions of Section 207 (a) of the Motor Carrier Act, 49 U. S. C. 307 (a), the Commission has authority to assure the public of adequate common carrier service. The National Transportation Policy seeks to foster sound economic conditions in transportation and among the several carriers. There must be a showing of inadequacy of service for the Commission to grant certificates to new carriers.

Labor disputes are temporary in character and eventually either fade out or are settled by the disputants. If the Commission grants certificates to new carriers to serve areas affected by labor disputes, without finding that there is an inadequacy of service, it is submitted that the Commission has misinterpreted the Act by granting permanent rights to meet an admittedly temporary situation. This does not conform to the National Transportation Policy as set out in the Interstate Commerce Act. The Commission recognized in *Montgomery Ward and Company* v. *Consolidated Freightways,* 42 M. C. C. 225, motor carrier

inability to serve premises where a strike was in progress. Although the Commission in the decision involved disavowed that it was resolving a labor dispute or that the basis of granting rights to Nebraska Short Line Carriers, Inc., was due to a labor dispute, the inescapable conclusion is that the labor dispute was the motivating factor in the application and in the presentation of evidence to the Trial Examiners by applicant. The Commission totally ignored the *Montgomery Ward and Company* v. *Consolidated Freightways, supra,* case. In addition, there was no dispute in the record and in the recommendations and report of the Trial Examiners that some unionized carriers serviced the areas involved.

Nebraska Short Line Carriers, Inc., applicant, and appellee herein, and its stockholder carriers, as well as shippers, had an adequate remedy for breach of duty against the unionized carriers in the instant matter. Failure to file a complaint against the unionized carriers and to follow this procedure under the Interstate Commerce Act (Section 49, U. S. C. 312) does not warrant the granting of operating authority. Nebraska Short Line Carriers, Inc., and its stockholder carriers, had an adequate opportunity to prevent, by the complaint procedure before the Commission, the very activity of the Teamsters and unionized carriers it complained of during this period.

(D)

Nebraska Short Line Carriers, Inc., in its presentation to the Trial Examiners, and its arguments to the Commission, sought to show that contractual relations between the Teamsters and unionized carriers involving the hot cargo clause and action thereunder by the Teamsters Union, ignited the situation that forced them to apply for operating rights. The labor dispute was admittedly tem-

porary and constituted the motivating factor in the application. Broad authority is granted the Commission under Section 212 of the Motor Carrier Act (49 U. S. C. 312) to compel compliance by a carrier with the duties and obligations imposed upon it by its certificate of public convenience and necessity. Nebraska Short Line Carriers, Inc., and its stockholder carriers failed to file complaints under this section with the Commission, which complaints conceivably could have prevented the alleged interruptions of service in the area serviced by the stockholder carriers of Nebraska Short Line Carriers, Inc. The complaint procedure on the part of the stockholder carriers would have provided a more adequate remedy for their situation.

The Commission has previously ruled in several cases that it can compel a carrier to comply with the Act and perform duties and obligations imposed upon it. *Montgomery Ward and Company* v. *Santa Fe Trail Transportation Co.*, 46 M. C. C. 212; *Planters Nut & Chocolate Co.* v. *American Transfer Company*, 31 M. C. C. 719.

Perhaps the best explanation of the situation in this case was characterized by Judge Mercer in the following language:

> "The old axiom that 'the hit dog howls' should be made to apply to this case. If Clark and others have a complaint against some or all of the line-haul carriers, they alone should do the howling. Section 212 of the Act provides them the opportunity to assert that complaint before the Commission and invoke a jurisdiction under which the issues could be decided in an appropriate proceeding. At least, until the complaint procedure has been tested, we should not permit the whole pack to come in asserting that some have been hit and claiming a right, on behalf of the pack, to a remedy which the Act was never intended to provide." (R. 269.) (Emphasis supplied.)

CONCLUSION.

The issues involved in this matter are novel and distinct and the questions presented are of substantial and public importance. The issues vitally affect the transportation industry and its employees in this country. The Interstate Commerce Act and the National Labor Relations Act, as amended, and all acts amendatory of both these statutes, are involved in this proceeding.

It is submitted to the Court that the order of the Interstate Commerce Commission to be reviewed by this Court is null and void for the reason that the finding of public convenience and necessity is not supported by the Commission's basic findings of fact. If this order is allowed to stand, it would become a very dangerous precedent in future requests for authority based primarily upon the existence of labor disputes. Although the Commission decided that it was without authority to determine the merits of the labor dispute and to determine the validity of certain collective bargaining clauses, it took the position that it could, nevertheless, find that a breach of duty had been perpetrated as a result of the labor dispute. It is respectfully submitted that the Commission asserted authority beyond that granted by the Interstate Commerce Act.

The aggrieved carriers in this proceeding, appellees herein, were provided with an opportunity to assert any complaint against the other carriers pursuant to Section 212 of the Act. Appellees are contending they are entitled to a remedy which the Act was never intended to provide.

It is, therefore, respectfully submitted that this Court should declare the Commission's order null and void.

Respectfully submitted,

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Attorney for General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellant.

Dated: August, 1962.

CERTIFICATE OF SERVICE.

I, David D. Weinberg, attorney for General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellant, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of August, 1962, I served copies of the foregoing Brief of Appellant to the Supreme Court of the United States on the several parties thereto as follows:

1. On the United States by mailing a copy in a duly addressed envelope with postage prepaid to Harlington Wood, Jr., United States Attorney, Federal Building, Peoria, Illinois, and by mailing a copy in a duly addressed envelope with air mail postage prepaid to Robert A. Bicks, Assistant Attorney General; John H. D. Wigger, Attorney, and The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with air mail postage prepaid to I. K. Hay, Assistant General Counsel, and Robert W. Ginnane, General Counsel, at the Offices of the Commission, Washington 25, D. C.

3. On Nebraska Short Line Carriers, Inc., Appellee, by mailing copies in duly addressed envelopes with first class postage prepaid to their respective attorneys of record as follows: to J. Max Harding and Duane W. Acklie, Nelson, Harding & Acklie, 605 South 12th Street, Lincoln, Nebraska; and to James S. Dixon, 1031 First National Bank Building, Peoria, Illinois, Attorneys for Nebraska Short Line Carriers, Inc.

4. On Burlington Truck Lines, Inc., Appellant, by mailing a copy in a duly addressed envelope with postage

prepaid to James A. Gillen and Russell B. James, 547 West Jackson Boulevard, Chicago 6, Illinois, attorneys for said Appellant.

5. On Santa Fé Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., Ringsby Truck Lines, Inc., Appellants, by mailing a copy in a duly addressed envelope with postage prepaid to David Axelrod, of Axelrod, Goodman & Steiner, 39 South La Salle Street, Chicago 3, Illinois, attorneys for said Appellants.

6. On Santa Fe Trail Transportation Company, Appellant, by mailing a copy in a duly addressed envelope with postage prepaid to Starr Thomas and Roland J. Lehman, 80 East Jackson Boulevard, Chicago 4, Illinois, attorneys for said Appellant.

DAVID D. WEINBERG,
Counsel for General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellant.

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